

The Honorable Salvador Mendoza, Jr.

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE

THE CINCINNATI INSURANCE  
COMPANY, an Ohio corporation; and  
THE CINCINNATI INDEMNITY  
COMPANY, an Ohio corporation,  
  
Plaintiffs,

vs.

ZAYCON FOODS, LLC, a Washington  
limited liability company; FRANK  
MARESCA and JANE DOE  
MARESCA, husband and wife, and the  
marital community composed thereof;  
MICHAEL GIUNTA and JANE DOE  
GIUNTA, husband and wife, and the  
marital community composed thereof;  
MIKE CONRAD and JANE DOE  
CONRAD, husband and wife, and the  
marital community composed thereof;  
ADAM KREMIN and JANE DOE  
KREMIN, husband and wife, and the  
marital community composed thereof;

Cause No. 2:17-cv-00140 SMJ

**PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

**September 29, 2017  
Without Oral Argument**

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT – 1  
USDC ED WA CAUSE NO. 2:17-cv-00140 SMJ

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1 and RICHARD BRADDOCK, an  
2 individual,

3 Defendants.

4 **RELIEF REQUESTED**

5 Plaintiffs Cincinnati Insurance Company and Cincinnati Indemnity  
6 Company (collectively “Cincinnati”) move this Court for summary judgment  
7 declaring that they have no obligation to defend, indemnify, or pay any benefits to  
8 or on behalf of any defendant with respect to the underlying lawsuit, *Braddock v.*  
9 *Zaycon Foods, LLC, et al.*, U.S. District Court for the Western District of  
10 Washington, Case No. 16-cv-01756 TSZ (the “Underlying Suit”). Summary  
11 judgment should be granted because the Underlying Suit does not allege any  
12 claims that could conceivably fall within any of the coverages provided in the  
13 Cincinnati insurance policies issued to Defendant Zaycon Foods, LLC  
14 (collectively, the “Policies”).<sup>1</sup>

17 **STATEMENT OF ISSUES**

18 1. Whether the Underlying Suit alleges “bodily injury” or “property  
19 damage” caused by an “occurrence,” as is required under Coverage A in the  
20 Policies.

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21 <sup>1</sup> Defendants Frank Maresca, Michael Giunta, Mike Conrad, and Adam Kremin will be  
22 referenced herein, collectively, as the “Individual Defendants.”  
23

1           2.     Whether the Underlying Suit alleges “personal and advertising  
2 injury,” as is required under Coverage B in the Policies.

3           3.     Whether the Underlying Suit alleges any claim for negligence in the  
4 “administration” of Zaycon’s “employee benefit plan,” as is required under the  
5 Employee Benefits Liability coverage in the Policies.  
6

7           4.     Whether the Underlying Suit alleges any claim that could fall within  
8 the Policies’ umbrella liability coverage for “bodily injury,” “property damage,”  
9 or “personal and advertising injury.”

10          5.     Whether the Underlying Suit alleges any claim that could fall within  
11 the Policies’ umbrella Employee Benefits Liability coverage.  
12

### 13                   **AUTHORITY AND ARGUMENT**

#### 14          **A.     This Motion Presents A Straight-Forward Question Of Law That Is** 15               **Ripe For Summary Judgment.**

16           Interpretation of an insurance contract is a question of law that may be  
17 resolved on summary judgment. *Quadrant Corp. v. American States Ins. Co.*,  
18 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Summary judgment is appropriate  
19 where “there is no genuine dispute as to any material fact and the movant is  
20 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v.*  
21 *Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The  
22 moving party bears the initial burden of showing there is no material factual  
23

1 dispute and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at  
 2 323. If the moving party meets its burden, the nonmoving party must go beyond  
 3 the pleadings and identify facts which show a genuine issue for trial. *Cline v.*  
 4 *Industrial Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1229 (9th Cir. 2000).

5  
 6 Under Washington law, insurance policies are to be construed as contracts.  
 7 *Quadrant, supra*, 154 Wn.2d at 171. The insurance contract is to be considered  
 8 as a whole and given a fair, reasonable, and sensible construction, as would be  
 9 given to the contract by the average person purchasing insurance. *Id.* If the  
 10 policy language is clear and unambiguous, it must be enforced as written; a court  
 11 may not modify the policy language or create ambiguity where none exists. *Id.*  
 12

13 As will be discussed below, the absence of coverage is clear when the plain  
 14 language in Cincinnati's Policies is applied to the allegations in the Underlying  
 15 Suit. Summary judgment should therefore be entered in Cincinnati's favor  
 16 without further delay.

17 **B. The Underlying Suit Alleges No "Bodily Injury" Or "Property**  
 18 **Damage," As Is Required Under Coverage A In The Policies.**

19 Coverage A in the Policies applies to "bodily injury" and "property  
 20 damage" caused by an "occurrence."<sup>2</sup> "Bodily injury" is defined as "bodily  
 21

22 <sup>2</sup> Sparling Dec. Ex. A at p. 11; Ex. B at p. 77; Ex. C at p. 142; Ex. D at p. 210 (Cincinnati  
 23 Policies).

1 injury, sickness or disease sustained by a person, including death resulting from  
 2 any of these at any time.”<sup>3</sup> “Property damage” is defined as “physical injury to  
 3 tangible property” and as “loss of use of tangible property that is not physically  
 4 injured.”<sup>4</sup> The Policies define “occurrence” as “an accident.”<sup>5</sup>

5  
 6 Braddock’s Complaint in the Underlying Suit includes the following  
 7 allegations:

8 35. In mid-2014, based on the breadth of Braddock’s experience and  
 9 his willingness to invest in start-up ventures, Defendants sought out  
 Braddock and solicited his investment in Zaycon.

10 36. Defendants thereupon made a series of fraudulent, reckless and/or  
 11 negligent misrepresentations and omissions to Braddock.

12 37. Certain of these fraudulent, reckless and/or negligent  
 13 misrepresentations and omissions were contained in the Second  
 Amended and Restated Operating Agreement of Zaycon Foods dated  
 November 1, 2012 (the “Operating Agreement”)[.]

14 \* \* \*

15 49. In addition, during these meetings and telephone conversations,  
 16 each of the Individual Defendants, acting on behalf of himself and  
 Zaycon and the other Individual Defendants, failed to inform Braddock  
 17 that . . . h) Maresca owned at least 1,000,000 more voting units than the  
 number of voting units set forth in Zaycon’s Operating Agreement; . . .  
 18 k) Kremin owned at least 1,625,000 more voting units than the number  
 of voting units described in Zaycon’s Operating Agreement; . . . n)

19  
 20 <sup>3</sup> Sparling Dec. Ex. A at p. 27; Ex. B at p. 92; Ex. C at p. 157; Ex. D at p. 225.

21 <sup>4</sup> Sparling Dec. Ex. A at p. 30; Ex. B at p. 96; Ex. C at p. 161; Ex. D at p. 229.

22 <sup>5</sup> Sparling Dec. Ex. A at p. 29; Ex. B at p. 95; Ex. C at p. 160; Ex. D at p. 228.

1 Conrad owned at least 1,625,000 more voting units than the number of  
 2 voting units described in Zaycon's Operating Agreement; and o) Giunta  
 3 owned over 3,000,000 voting units which were not referenced in the  
 Operating Agreement (together with the omissions in the Operating  
 Agreement, the "Omissions").

4 50. During the period from mid-2014 through January 2016, each of  
 5 the Individual Defendants, acting on behalf of himself and Zaycon and  
 6 the other Individual Defendants continued to make the  
 Misrepresentations and Omissions, orally and in writing, to Braddock in  
 7 connection with solicitations of additional capital and loans from  
 Braddock.

8 \* \* \*

9 69. All of Braddock's investments [in Zaycon] were made in reliance  
 10 on representations and omissions made in the Operating Agreement and  
 by Maresca, Giunta, Conrad and Kremin, each of whom was acting on  
 behalf of himself and Zaycon and the other Individual Defendants.

11 70. All of Braddock's loans [to Zaycon] were made in reliance on  
 12 representations and omissions made in the Operating Agreement and by  
 Maresca, Giunta, Conrad and Kremin, each of whom was acting on  
 13 behalf of himself and Zaycon and the other Individual Defendants.

14 \* \* \*

15 79. . . . Braddock became Co-managing Member of Zaycon.

16 \* \* \*

17 81. . . . Braddock also became Zaycon's Chief Executive Officer and  
 received 250,000 additional Class A membership units in Zaycon in  
 consideration of his services as CEO pursuant to a written agreement.

18 \* \* \*

19 89. On or about April 14, 2016, a private equity firm based in Boston,  
 20 Massachusetts by the name of Great Hill Partners ("Great Hill")  
 submitted a proposal to make an investment of \$25 million to buy into  
 21 Zaycon at a pre-money enterprise valuation of \$30 million.

22 101. [Defendants Maresca, Giunta, Conrad and Kremin] feared that  
 Great Hill's investment would change the power structure in the  
 23 Company.









1           158. Braddock brings this action to recover damages for violations of  
 2 the Securities Exchange Act of 1934, Rule 10b-5 promulgated  
 3 thereunder, Washington State securities laws, common law fraud,  
 4 negligence, breach of contract, breach of fiduciary duty, and aiding and  
 5 abetting breach of fiduciary duty in an amount to be established at trial  
 in excess of \$6.5 million dollars, and for a declaratory judgment that  
 some or all of the membership units issued to Conrad, Maresca and  
 Kremin and others are void.<sup>6</sup>

6           While Cincinnati takes no position on the merits of the Underlying Suit, the  
 7 allegations in Braddock's Complaint describe only a loss of investments and other  
 8 business-related claims that are not covered by Cincinnati's Policies. As a  
 9 preliminary matter, the Underlying Suit does not allege any "bodily injury" as  
 10 defined in the Policies, because Braddock is not seeking any damages from  
 11 Zaycon or the Individual Defendants because of any "bodily injury, sickness or  
 12 disease."

14           Braddock's Complaint likewise alleges no claim for damages because of  
 15 "property damage." "Tangible property" means "property 'that has physical form  
 16 and substance . . . [, t]hat which may be felt or touched, and is necessarily  
 17 corporeal[.]'" *Scottsdale Ins. Co. v. International Protective Agency, Inc.*, 105  
 18 Wn. App. 244, 249, 19 P.3d 1058 (2001) (quoting Black's Law Dictionary at  
 19 1456 (6th ed. 1990)). In *Scottsdale*, a bar lost its liquor license after the insured, a  
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 22           <sup>6</sup> Sparling Dec. Ex. E (Complaint in Underlying Suit) at pp. 276, 278-79, 281-83, 285-  
 23           89, 291-93.

1 security company, failed to prevent a minor from entering the premises. *Id.* at  
2 246-47. The bar sued the insured for negligence and breach of contract, seeking  
3 damages for loss of its liquor license and lost business. *Id.* Like Cincinnati's  
4 Policies, the Scottsdale policy defined "property damage" as "physical injury to  
5 tangible property" and "loss of use of tangible property." *See id.* at 246.  
6 Scottsdale declined to defend or cover the insured for the bar's suit.  
7

8 In subsequent coverage litigation, the Washington Court of Appeals ruled  
9 that a liquor license and loss of a business are not "tangible property," because  
10 "[a] liquor license is merely representative of a privilege granted by the state and,  
11 as such, is intangible property," and "a 'business' is likewise intangible for it  
12 merely describes a 'commercial activity engaged in for gain or livelihood.'" *Id.*  
13 at 249-50 (quoting Black's Law Dictionary at 198 (6th Ed. 1990)). Accordingly,  
14 the bar's loss of its liquor license and consequent loss of business were not  
15 "property damage" under Scottsdale's policy, and Scottsdale was not obligated to  
16 defend or provide coverage for the bar's lawsuit. *Id.* at 250-51.  
17

18 Similarly, in *Washington Pub. Util. Dists' Utils Sys. v. Public Util. Dist.*,  
19 112 Wn.2d 1, 14, 771 P.2d 701 (1989), the Washington Supreme Court ruled that  
20 an insurance policy covering "the loss of *tangible* property in the care, custody, or  
21 control of the insured," did not provide coverage for claims against the insured  
22 for loss of utility district funds resulting from a securities investment, because  
23

1 such a loss is “not damage to tangible property.” (Emphasis in original; footnote  
2 omitted.)

3 Most recently, in *Country Mut. Ins. Co. v. DeAtley*, 2013 WL 6119231  
4 (E.D. Wash. Nov. 21, 2013),<sup>7</sup> this Court ruled that loss of an investment is not  
5 “property damage” under a liability insurance policy. The insured sold  
6 conservation tax credits to investors in Colorado; the tax credits were thereafter  
7 disallowed by the Colorado Department of Revenue. The investors sued, alleging  
8 that the insured sold the tax credits either with the intent to defraud or with  
9 knowledge that they were unlikely to be approved for tax purposes. *Id.* at \*1.  
10 Country Mutual agreed to defend the insured under a reservation of rights, and it  
11 also sued for declaratory relief. In the declaratory action, this Court granted  
12 summary judgment for Country Mutual, finding that the tax credits were not  
13 “tangible property”:  
14  
15

16 Unlike real property or chattels, tax credits do not have a physical form  
17 or substance that can be detected by the human senses. Indeed, tax  
18 credits are a prime example of *intangible* property; although they have  
19 value, they exist solely on paper. . . . [T]he Court concludes that the  
20 plaintiffs in [the underlying] actions cannot establish injury to and/or  
21 loss of use of “tangible property” so as to trigger coverage.

22 This conclusion is further reinforced by the general rule that “loss of [an]  
23 investment does not constitute damage to tangible property” under a  
commercial general liability insurance policy. *Tschimperle v. Aetna  
Cas. & Sur. Co.*, 529 N.W.2d 421, 425 (Minn. 1995). Although

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<sup>7</sup> A copy of this decision is attached.

1 Washington courts have not directly addressed this issue, courts in other  
2 jurisdictions have consistently ruled that financial losses caused by the  
3 sale of fraudulent or misrepresented investments are beyond the scope of  
standard “property damage” coverage. . . .

4 *Id.* at \*5 (emphasis in original). Country Mutual, therefore, had no obligation to  
5 defend or indemnify its insured against the investors’ lawsuits. *Id.*

6 In the Underlying Suit, Braddock alleges that he invested and loaned  
7 substantial amounts to Zaycon based upon misrepresentations and omissions  
8 regarding Zaycon’s capital structure, that the Individual Defendants concealed  
9 facts relating to the extent of their ownership of Zaycon, that the Individual  
10 Defendants manipulated Zaycon’s capital structure so that Braddock could not  
11 assume control over the company, and that the Individual Defendants  
12 manipulated the voting process and conspired to oust Braddock as Zaycon’s CEO  
13 and co-managing member. These allegations describe only a loss of investments  
14 and other business-related claims that do not qualify as “physical injury to  
15 tangible property” or “loss of use of tangible property,” as is required for  
16 coverage under the Policies. *Cf. Scottsdale, supra; DeAtley, supra.* Summary  
17 judgment should therefore be granted declaring that Cincinnati has no duty to  
18 defend or indemnify with respect to the Underlying Suit under Coverage A.  
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1 **C. The Underlying Suit Alleges No “Personal And Advertising Injury”.**

2 “Personal and advertising injury” Coverage B in the Policies covers an  
3 insured’s liability for certain enumerated offenses, such as false arrest, malicious  
4 prosecution, wrongful eviction, slander, violating a person’s right of privacy, and  
5 copyright infringement.<sup>8</sup>

6  
7 The allegations in the Underlying Suit do not allege any slander, violation  
8 of privacy, copyright infringement, or any other “personal and advertising injury”  
9 offense listed in Cincinnati’s Policies. *Cf. DeAtley, supra*, at \*4 (“personal and  
10 advertising injury” coverage does not cover claims for loss of investment or other  
11 business-related economic damages). Thus, summary judgment should likewise  
12 be granted with respect to Coverage B.

13  
14 **D. The Underlying Suit Alleges No Claim That Could Fall Within The Policies’ Employee Benefits Liability Coverage.**

15 The Policies’ EBL Coverage applies to liability for negligent acts, errors or  
16 omissions in the “administration” of Zaycon’s insured’s “employee benefit  
17 program.”<sup>9</sup> The Policies define “employee benefit program” to include benefits  
18 such as medical insurance, profit sharing or pension plans, and employee stock  
19

20 <sup>8</sup> See Sparling Dec. Ex. A at pp. 17, 29; Ex. B at pp. 83, 95; Ex. C at pp. 148, 160; Ex. D at pp.  
21 216, 228.

22 <sup>9</sup> See Sparling Dec. Ex. A at p. 35; Ex. B at p. 100; Ex. C at p. 165; Ex. D at p. 233.  
23

1 ownership or subscription plans, so long as such benefits are generally available  
 2 to all eligible employees.<sup>10</sup> The term “administration” is defined to include  
 3 providing information to employees regarding eligibility and scope of an  
 4 employee benefit program; interpreting and handling records relating to the  
 5 program; and effecting, terminating or continuing an employee’s participation in  
 6 the program.<sup>11</sup>

8 As noted above, the Underlying Suit asserts claims based upon alleged  
 9 misrepresentations and omissions that induced Braddock to invest in Zaycon, and  
 10 the Individual Defendants’ alleged efforts to oust Braddock as an employee and  
 11 co-managing member of Zaycon. These allegations do not seek to impose  
 12 liability on Zaycon or the Individual Defendants because of any negligence in the  
 13 “administration” of a Zaycon “employee benefit program.”

15 As a preliminary matter, the EBL coverage only applies to negligent errors  
 16 or omissions; it does not cover liability sounding in contract. For example, in  
 17 *First Southern Ins. Co. v. Jim Lynch Enters, Inc.*, 932 F.2d 717 (8th Cir. 1991),  
 18 the court held that claims based upon the insured’s failure to pay an employee  
 19 pursuant to a stock purchase agreement and failure to determine stock value were  
 20

21 <sup>10</sup> Sparling Dec. Ex. A at p. 40; Ex. B at p. 105; Ex. C at p. 170; Ex. D at p. 238.

22 <sup>11</sup> Sparling Dec. Ex. A at p. 39; Ex. B at p. 104; Ex. C at p. 169; Ex. D at p. 237.

1 based upon contract and not negligence; the insured's employee benefits liability  
 2 coverage therefore did not apply. *Id.* at 719. *See also Granite Outlet, Inc. v.*  
 3 *Hartford Cas. Ins. Co.*, 2015 WL 300729 at \*5 (E.D. Cal. 2015) (EBL coverage  
 4 did not apply because insured's failure to pay employees was a breach of contract  
 5 and not negligence).<sup>12</sup>  
 6

7 Similarly, in the Underlying Suit Braddock alleges, *inter alia*, that the  
 8 Individual Defendants concealed facts regarding Zaycon's stock ownership,  
 9 manipulated Zaycon's capital structure to keep him from acquiring control over  
 10 the company, and improperly removed him as co-managing member and CEO.<sup>13</sup>  
 11 These claims regarding Braddock's purchase of Zaycon stock are based upon  
 12 contractual obligations and not negligence, and Cincinnati's EBL coverage  
 13 therefore does not apply to the Underlying Suit. *First Southern, supra.*  
 14

15 Moreover, Braddock's claims in the Underlying Suit are based on his status  
 16 as an investor and as Zaycon's co-managing member and CEO. These claims do  
 17 not allege any error or omission related to the "administration" of an "employee  
 18 benefit program." For example, in *Maryland Cas. Co. v. Economy Bookbinding*  
 19 *Corp. Pension Plan & Trust*, 621 F. Supp. 410 (D.N.J. 1985), the court held that a  
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21 <sup>12</sup> A copy of this decision is attached.

22 <sup>13</sup> *See, e.g.,* Sparling Dec. Ex. E at pp. 287-89.  
 23



1 company's losses due to poor investments did not involve "administration" of its  
2 "employee benefit program." *Id.* at 413-14. The underlying suit in that case  
3 alleged, *inter alia*, that the insured improperly invested company funds in its own  
4 securities ("Claim 1"), and the insured also failed to collect interest on returned  
5 real estate investments ("Claim 3"). *See id.* at 412. The court granted summary  
6 judgment and ruled that these claims were not covered because "'investment' is  
7 not 'administration' under the [insurance] contract," and because "[t]he collection  
8 of . . . accounts [receivable] is a task associated with the management of  
9 investment funds, not with the administration of the Plan." *Id.* at 413-14.

11 As previously noted, the claims in the Underlying Suit are based upon  
12 alleged misrepresentations regarding Braddock's investment in Zaycon and  
13 purchase of company stock, and his alleged ouster as co-managing member and  
14 CEO. These claims do not arise out of any negligent error or omission in the  
15 "administration" of an "employee benefit program," and summary judgment  
16 should likewise be granted on this issue.<sup>14</sup>

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<sup>14</sup> The EBL coverage is also subject to an exclusion for damages arising out of an insured's  
"intentional, dishonest, fraudulent, criminal or malicious act." (*See Sparling Dec. Ex. A at p.*  
*35; Ex. B at p. 100; Ex. C at p. 165; Ex. D at p. 233.*)

**E. The Underlying Suit Alleges No Claim That Could Fall Within The Policies' Umbrella Liability Or Umbrella EBL Coverage.**

Lastly, the Policies include commercial umbrella liability coverage, which applies to “bodily injury,” “property damage” and “personal and advertising injury” that exceed the underlying primary liability limits, or that are not covered or excluded by the underlying insurance.<sup>15</sup> As discussed in Sections B and C above, the Underlying Suit does not allege any facts or claims that could qualify as “bodily injury,” “property damage” or “personal and advertising injury,” as those terms are defined in the umbrella coverage.<sup>16,17</sup> As a matter of law, therefore, the Policies’ umbrella coverage for “bodily injury,” “property damage” or “personal and advertising injury” does not apply to the Underlying Suit.

The Policies’ umbrella insurance also includes EBL coverage, which applies in excess of the EBL coverage provided in the underlying primary

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<sup>15</sup> Sparling Dec. Ex. A at p. 50; Ex. B at p. 115; Ex. C at p. 180; Ex. D at p. 248.

<sup>16</sup> See Sparling Dec. Ex. A at pp. 63, 65-66; Ex. B at pp. 128, 130-31; Ex. C at pp. 193, 195-96; Ex. D at pp. 261, 263-64.

<sup>17</sup> In contrast to underlying Coverage A, the umbrella coverage form defines “bodily injury” as “bodily harm or injury, sickness, disease, disability, humiliation, shock, fright, mental anguish or mental injury, including care, loss of services or death resulting from any of these at any time.” Sparling Dec. Ex. A at p. 63; Ex. B at p. 128; Ex. C at p. 193; Ex. D at p. 261.

1 insurance.<sup>18</sup> The umbrella EBL coverage only applies to “such hazards for which  
 2 coverage is afforded by [the] such ‘underlying insurance’.”<sup>19</sup> As discussed in  
 3 Section D above, the allegations in the Underlying Suit are not covered by the  
 4 underlying EBL coverage. Consequently, the Policies’ umbrella EBL coverage  
 5 likewise does not apply.  
 6

7 **F. Cincinnati Has No Ongoing Duty To Defend And Should Be Allowed**  
 8 **To Withdraw From The Defense.**

9 Washington applies the “eight corners” rule to determine whether, on the  
 10 face of the complaint and the insurance policy, there is an issue of fact or law that  
 11 could conceivably result in coverage under the policy. *Expedia, Inc. v. Steadfast*  
 12 *Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014). The duty to defend exists  
 13 when the policy could *conceivably* cover the allegations in a complaint.  
 14 *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d  
 15 693 (2010).  
 16

17 On the other hand, an insurer has no duty to defend if the claims alleged are  
 18 clearly not covered by the policy. *National Surety Co. v. Immunex Corp.*, 176  
 19 Wn.2d 872, 879, 297 P.3d 688 (2013) (“Although the duty to defend is broad, it is  
 20 not triggered by claims that clearly fall outside the policy”); *State Farm Gen. Ins.*

21 <sup>18</sup> Sparling Dec. Ex. A at p. 70; Ex. B at p. 135; Ex. C at p. 200; Ex. D at p. 268.

22 <sup>19</sup> *Id.*  
 23

1 *Co. v. Emerson*, 102 Wn.2d 477, 486, 687 P.2d 1139 (1984) (“[T]he duty to  
 2 defend hinges not on the insured’s potential liability to the claimant, but rather on  
 3 whether the complaint contains any factual allegations rendering the insurer liable  
 4 to the insured under the policy”).

5  
 6 If this Court rules there is no coverage and therefore no obligation to  
 7 indemnify under Cincinnati’s Policies, it necessarily follows that there remains no  
 8 potential for coverage and that the duty to defend no longer exists. In *Emerson*,  
 9 *supra*, the court recognized this when it held that the policy provides a defense  
 10 “only if coverage would apply.” *Emerson, supra*, 102 Wn.2d at 486. Similarly,  
 11 in *Truck Ins. Co. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 58 P.3d 276 (2002),  
 12 the Supreme Court encouraged insurers to seek declaratory relief regarding their  
 13 duty to defend, and indicated that an insurer defending under a reservation of  
 14 rights may withdraw its defense upon a court determination that it owes no  
 15 defense. *Id.* at 760-761. Likewise, in *Alea London, supra*, 168 Wn.2d at 405, the  
 16 Washington Supreme Court reiterated that “When the facts or the law affecting  
 17 coverage is disputed, the insurer may defend under a reservation of rights until  
 18 coverage is settled in a declaratory action.”  
 19

20  
 21 In *Canal Indem. Co. v. Adair Homes, Inc.*, 737 F. Supp. 2d 1294 (W.D.  
 22 Wash. 2010), *affirmed*, 445 Fed. Appx. 938 (9th Cir. 2011), the court applied  
 23 *Alea London* and held that an insurer could withdraw from the insured’s defense

1 once a declaratory judgment action determined there was no coverage:

2 An insurer's duty to defend an insured ends when it is determined  
3 that a claim is not covered. *See, i.e., American Best Food, Inc. v.*  
4 *Alea London, Ltd.*, 168 Wash.2d 398, 405, 229 P.3d 693 (2010);  
5 *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 561, 951 P.2d 1124  
6 (1998). The procedure to follow when coverage is uncertain is to  
7 defend under reservation of rights and seek a declaratory judgment  
8 regarding the issue of coverage. Where the declaratory judgment  
9 action determines there is no coverage, as in this case, the insurer,  
Canal, may withdraw from the defense of the insured, Adair Homes.  
10 *See, i.e., Farmers Ins. Group v. Johnson*, 43 Wash.App. 39, 44, 715  
11 P.2d 144 (1986). It is only where the facts necessary to determine  
coverage are at issue, that the insurer must maintain a defense  
throughout the underlying litigation. . . .

12 *Id.*, 737 F. Supp. 2d at 1303.

13 As discussed above, Cincinnati's Policies provide no coverage for any of  
14 the claims alleged in the Underlying Suit. Summary judgment should therefore  
15 be granted declaring that Cincinnati has no further duty to defend Zaycon and the  
Individual Defendants in the Underlying Suit.

### 16 **III. CONCLUSION**

17 For the foregoing reasons, summary judgment should be granted declaring  
18 that Cincinnati has no duty to defend, indemnify, or pay insurance benefits to or  
19 on behalf of any defendant herein with respect to the Underlying Suit, and that  
20 Cincinnati may immediately cease and withdraw from defending Zaycon and the  
21 Individual Defendants in the Underlying Suit.  
22  
23

1 DATED this 10th day of August, 2017.

2 SOHA & LANG, P.S.

3  
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2017 a copy of the foregoing was electronically filed and served in accordance with the Court's electronic filing procedures using the CM/ECF System, which will send notification of such filing to all counsel of record.

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Dated this 10<sup>th</sup> day of August, 2017

/s/Angela Murray  
Angela Murray  
Legal Secretary to Gary Sparling